MEMORANDUM
April 17, 2013

TO: Phil
FROM: Lawrence Lessig
RE: Your workshop

I am sorry that a rescheduled hearing before the Vermont legislature will force me to miss your workshop — especially as you titled your paper a "reply to Larry Lessig's Chair Lecture." In the few pages that follow, I try to address some of the issues your essay raises. I apologize that I must do so in this form, though perhaps it is more constructive than the emotionally difficult exchange that would have been necessary at the workshop.

But let me begin with what I hope is obvious: *Of course*, the threats and verbal attacks on your son, or the other prosecutors in this case are outrageous, and as a father, I empathize with your anger. Obviously there are many who are upset at what has happened. But none close to Aaron support those wrongful invasions, and certainly Aaron himself wouldn't have. Everyone feels entitled — and rightly, in my view — to express their view about the justice in this prosecution. But threats and invasions of privacy are clearly wrong, and your essay makes a powerful and compelling argument for the kind of tolerance that justice requires.

I am in less agreement, however, with some of the other claims that you have made, and to advance the conversation that will happen in my absence, I have summarized those disagreements here.[1]

1. p3: "Aaron Swartz faced at different times a sentence of between 90 and 180 days in what the Department of Justice agreed could be a minimum security facility if he admitted to the felony charges brought against him and documented by photographs, fingerprints, abandoned instrumentalities of the crime, and a published plan to do exactly what he did."

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[1] And as one note: as valuable as Orin Kerr's contributions to this debate are, Jamie Boyle's perspective is also quite useful. See http://bit.ly/BoyleAaron.

Throughout your essay, you have understated the punishment that the government offered to recommend. At no time was Aaron offered "90 days in a minimum security facility." The initial offer was (1) 90 days in prison, (2) then time in a half-way house or home detention, (3) two years banned from using a computer, and (4) pleading guilty to a felony. As was discussed with the prosecutor, because of a medical condition, Aaron could not qualify for a "minimum security facility."

Of those four conditions, I would have thought that (3) would have been the worst: for a geek, non-access to a computer is like not reading to the rest of us. But it was the felony — and the subsequent relinquishment of his political rights — that was most the difficult for Aaron. Aaron did not believe that he had committed a crime. And as civic engagement was his life, he could not bring himself to accept the forfeiture of those rights.

I know many advised Aaron to accept the plea. His lawyers warned him that there was some chance the prosecutor would not stick to her offer (in *US v. Gonczy*, 357 F3d 50 (CA1 2004), she was admonished for promising to support one sentence and then arguing for a more significant penalty), but even so, many viewed the costs of fighting the charge (both the estimated $1 million in legal fees and the threatened penalties if he lost) as greater than admitting his own guilt. I understood that calculation, and while Aaron didn't ask me directly for my advice, I also understood Aaron's decision not to admit guilt for a crime he did not believe he had committed. If I had been in his place, believing as he did, I would have done the same.

However, whether you think he was right in his legal judgment or not, his view (as I will describe below) was not crazy. It would have been crazy to believe he had done nothing "wrong": as I published after he was arrested, if the allegations of the government were correct, then *certainly* he had done something wrong. But there is, or we should hope there is, a big step from "wrong" to "felon." Aaron did not believe he had committed a felony. That belief was not crazy.

2. p3: "On a number of separate occasions over a 3½ month period, he had secretly entered a room at MIT to connect a computer he had apparently bought for just that purpose to

> the MIT system which carried its internet to its faculty, students, and legitimate visitors."

It is a detail, but in fact he only "entered a room" late in the 3 month period. All of his early access was in public areas. At the end, he entered a closet. The government charged he had broken into the closet. In fact the closet was unlocked.

But more important is the qualifier in "legitimate visitors." This issue is critical to the legal issue in the case.

First, Aaron was a "legitimate visitor" in the sense that he had many connections to MIT which authorized him to be there — he collaborated with MIT faculty and associates, including Tim Berners-Lee, the inventor of the World Wide Web; his brother was a student at MIT; his father worked for MIT.

But second, it was MIT's policy to offer free access to the Internet for anyone on campus. That policy was no doubt extraordinary. But it necessarily shrinks the class of potentially "illegitimate visitors" significantly. Had he been banned from MIT's campus (as he later was), then he would not have been a "legitimate visitor." But at the time of the alleged crime, he had not been so banned.

3. p4: "Aaron Swartz had published an appeal ("The Guerrilla Open Access Manifesto") apparently addressed to all those who believed in freedom of access to information on the internet. He called on them to use the access to copyrighted material for which their university or others had paid, to download it in mass, and then upload it in a form available to all, precisely as Swartz was about to do."

Aaron believed in the "Guerilla" Open Access Manifesto. It is not clear, it turns out, who wrote it. But the Manifesto does not call for free access "to information on the internet" in the simple sense of anything that is copyrighted. The target was scientific and scholarly literature, much of it in the public domain. He was not targeting the Sony Music Archive, or the Universal Film Database.

And critically, Aaron did not "upload it in a form available to all." Whether he was "about to do" that depends upon your judgment about his motive — which I describe below.

4. p5: "I will not speculate on the causes of Aaron Swartz's suicide. Those immediately around him must have known what the prosecutors did not know: that Swartz's mental health had been and remained extremely fragile."

I do not believe this is true. Aaron's first lawyer contacted me immediately after his arrest, and spoke to me directly about his fear that Aaron was suicidal. He recounted to me then — in the spring, 2011 — that he had told the prosecutors this explicitly then. That account is confirmed by the Boston Globe's story: As Good is quoted to have said, "I told Heymann the kid was a suicide risk. His reaction was a standard reaction in that office, not unique to Steve. He said, 'Fine, we'll lock him up.' I'm not saying they made Aaron kill himself. Aaron might have done this anyway. I'm saying they were aware of the risk, and they were heedless."

I didn't believe Aaron was suicidal — though I was obviously wrong about that. But at the beginning at least, he seemed optimistic that "the system would get it," as it once said. It had before — with the PACER database. He thought it would again. But the key for is that there was no reason in the spring, 2011, for Andy Good to mischaracterize to me what he had said to the prosecutor.

5. p4: "The prosecutors had no role in the investigation leading to his initial arrest after fleeing from an MIT police officer."

I believe that the MIT report when issued will show that there was in fact extensive involvement by the prosecutors after the alleged intrusion was noticed, long before the arrest.

6. p6: "The proposed sentence for the plea of guilty to the felonies was a total of 90 days, roughly comparable to the time one would serve for reckless driving."

Again, this is not a complete statement of the initial offer — made before the indictment — and it was an offer that was never made again after the indictment. Instead, the longer Aaron insisted on his right to test the government's charge, the higher the threatened penalty rose.

7. p7: "In this case, Swartz never admitted to his well-documented and publicly announced actions, never expressed regret, and would not even return the documents he had

> taken from JSTOR for six months until JSTOR agreed to limit his civil liability to JSTOR."

Aaron was always willing to confess to his behavior. He was always willing to return the documents. But obviously, lawyers recognize that those offers would not be acted upon until something was given in return.

8. p8: "Let me note that there is no claim that the prosecutors ever heard of fears of suicide for nearly 2 years, not since his first attorney had brought to the prosecutor's attention that Mr. Swartz was subject to worrisome depression."

Again, I cannot believe this is correct. Long before the suicide — indeed, in the first months after the arrest — Aaron's attorney reported to me that he had conveyed this concern (so long before he had any reason to lie about it). And in any case, this whole tragic episode lasted just under 2 years.

9. p9: "Second, much is made of the altruistic motivations of Mr. Swartz as he downloaded JSTOR's inventory and ignored the costs (as well as the benefits) of its efforts to acquire, organize, archive, and make easily accessible a huge collection of often obscure papers."

Neither you nor the prosecutor knows Aaron's motives here. I do. But without revealing what I know, let's be clear about what could reasonably be believed: one could reasonably believe only one of two possible motives: either he was (1) building a database to analyze bias in scholarship (as he had done while at Stanford using the Westlaw database, resulting in a published article), or he was (2) intending to make available (consistent with the Manifesto, and likely in the Third World) in disobedient protest this scholarly material. If his motive was (1), then it wasn't "altruism," it was scholarship. And if it was (2), it also wasn't "altruism," it would have been civil protest. And like every civil disobedient, that protest would then have been public.

In my view, while there isn't a Robin Hood defense to crime, if there was a crime here, both of these motives are altruistic, but also more than altruism. That something more should be reckoned by our criminal justice system.

10. p11: "Finally, committing a crime secretly or in a disguise to avoid any formal accusation has never been thought of as civil disobedience. Rosa Parks did not ride in the white section of a segregated bus in disguise. Martin Luther King and Gandhi invited the authorities to punish them"

First, if the materials had been released, it would not have been disguised.

And second, neither Parks nor King were threatened with felonies.[2] Gandhi had been, but most of us take that to be a measure of the injustice of the regime he was attacking.

11. p13: "There would be little reason to believe that a misdemeanor would discourage future efforts by Swartz and others to enter someone else's property, hack through technological barriers, and covertly appropriate a huge store of data that was costly to assemble or create."

There is literally no one who knows anything about Swartz who believes that a misdemeanor, tied to a deferred felony prosecution, would not have been 100% effective in specific deterrence. And it is a misstatement to say he "hacked through technical barriers" — as Alex Stamos makes clear, there was no "hacking" involved in this case. See http://bit.ly/NotHacking.

12. p14: "Having decided to remove any charges based on exceeding authorized access (i.e., violating the conditions of access), the superseding indictment was changed to focus exclusively on the occasions when Swartz obtained wholly unauthorized access to MIT's or JSTOR's computer systems. That led to charging thirteen felonies rather than the four originally charged. ... Under the sentencing guidelines, the multiple counts would be clumped together for sentencing purposes. The number of counts had no effect whatsoever on the presumptive sentence or the small fraction of that which could be the result of a plea."

It is certainly the case that the number of counts don't matter to the professionals in the system — the judges, and the prosecu-

[2] As I noted in my lecture, technically King was once, but so bogus was the charge that an all white jury acquitted him of it almost immediately.

tors. But many argue that it matters significantly to the jury. It is easier for the jury to convict with 13 counts than with 2 (which would have been the number left after the government decided *Nosal* restricted the plausible counts).

13. p16: "The discovery and delivery of that seemingly innocuous email a month and a half before the hearing was made the basis of dramatic charges of a knowing violation of Brady."

    I believe you are not characterizing the allegation accurately.

Aaron's attorney had argued that the evidence of Aaron's alleged "hacking" should have been excluded since it was stale. I don't know whether that argument is valid or persuasive, but its foundation was the fact that Aaron's computer was not searched for more than a month after the arrest.

The government argued against that motion by claiming that it should be forgiven for the staleness, since it had no access to or control of the machine for more than a month.

That claim, as the email you reproduce shows, turns out to have been false, since immediately after the arrest, the Secret Service advised the government it was "prepared to take custody" of the machine.

But the specific wrong alleged by Aaron's attorney is that that email was withheld until after the hearing at which the admissibility of the evidence would have been decided. The government claims it handed the email over to Aaron's attorney at the beginning of the hearing — already late, given the fact that even then, Aaron's attorney would have had little time to process the meaning of the email, and incorporate it into an argument. But in any case, Aaron's attorney claims the email was given to him after the hearing.

Again, based on what I know from the facts I was told *before* Aaron killed himself, I believe the government's claims are not true. Aaron's partner had recounted to both my wife and me after that hearing, the scene in which the prosecutor had handed the evidence over to Aaron's attorney. That scene was significant not because of the handover, but because Aaron asked her not to show

affection in front of the prosecutor. Only later did the significance of the timing of the handover become significant to her, or anyone else. Knowing her as I do, I find it very difficult to believe that her account before the suicide was incorrect.

14. p18: "A defendant's passionate desire to make the world better in a way he chooses by a secret, unaccountable, and very substantial violation of the law should not be, and has not in the past, been a ground for not prosecuting."

No one, and certainly not I, was arguing there was no "ground" for "prosecuting." The only question was the appropriate resolution of that prosecution. My criticism throughout was not that an arrest had been made, or even that the government had taken it so seriously. Both actions were, in my view, completely appropriate. What was not appropriate, in my view, was that the more the government learned — the more clearly they saw that this wasn't commercial or destructive "hacking"; that at worst, this was an act attacking "an unjust law" as the Manifesto put it, or at best, an effort to gather a database for a scholarly research project — the harsher their threats and penalties became. Aaron believed, as I (naively) did, the more people saw, the more they would understand. That understanding, however, was not made manifest.

15. p19: "Without accepting responsibility for one's actions, breaking a law you oppose is not civil disobedience."

I agree with you about this. This is why I have argued against digital civil disobedience, except when people are willing to accept responsibility for their actions. Of course, and again, the costs of accepting such responsibility in our system are ruinous. Yet in my view, publicity is an essential element of justified civil disobedience.

But there is nothing in the record to suggest that *if* Aaron intended his actions to be a form of civil disobedience, he would not have engaged in it openly. He was arrested while he was collecting the JSTOR database. The substantial harm here would only have happened when he made that database available to others. There is nothing to suggest he would have done that secretly — indeed, as I showed in my Lecture, he was already openly discussing in public fora his plans and expressly linking the leaks to

his public email. He would have been stupid to do this, I believe (which is why I believe he never shared with me his plans), but I am quite certain he would have been completely open about his behavior, as he had always been before, at least at the appropriate time.

16. p20: "When an individual believes he has a moral right to disobey the law and when his immediate community applauds violation of the law,"

To be clear — as your essay is denominated "A Reply to Larry Lessig's Chair Lecture" — I expressly and publicly criticized Aaron's behavior, assuming at least that it was as the government alleged.

17. p18: "very substantial violation of the law"

Throughout your essay, you're making a strong assumption that Aaron's behavior in fact violated federal criminal law. Aaron's view was that it didn't. We should at least be clear that his view is not crazy.

I don't speak to "wire fraud" because I can't for the life of me understand that regulation anymore. But as to the CFAA, there is indeed substantial confusion about whether and how that statute would regulate this behavior.[3]

As you note, the superseding indictment charged Aaron with "unauthorized access" to MIT and JSTOR's facilities. It did not charge him with "exceeding authorized access." It is clear, as I believe the MIT report will indicate, that Aaron in fact had authorization to use the MIT network. He also had authorization (through MIT and through his Harvard affiliation) to access the JSTOR database.

The alleged "unauthorized access" comes, as you put it, from "his hacking past electronic barriers." But we should be clear about what that "hacking" entailed.

First, Aaron was downloading JSTOR articles. There was no "hacking" to get access to those articles. Once one has access to the

[3] This is a point Orin Kerr and I make in a piece just published in The Atlantic.

JSTOR database, the system imposes no technical barriers to accessing its articles. Instead, it organizes its materials in a simple, logical way. E.g., you can download an article of mine from JSTOR with this URL (assuming you're logged into the server):

http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/1229086

What Aaron obviously realized was that it was trivial to write a routine to download all JSTOR articles — by changing the document number for each request.

Second, the government charges that both MIT and JSTOR took steps to disable this automatic download. (You say "he knew MIT and JSTOR were trying to exclude him" which is ambiguous: he knew the connectivity was disabled; but I don't believe there is any evidence anyone actually sent an email to the email addresses he provided when he signed up for MIT Internet access telling him he was being excluded.) The steps they took involved blocking access from his account, from his IP address, and finally, from his MAC address (which identified his machine). In each case, as the government alleges, Aaron worked around the blocking: he got a new account, he used a different IP address, and he provided a different MAC address.

It is not clear that that behavior is "hacking" as the statute regulating unauthorized access is written. Aaron's expert would have testified it was not. See http://bit.ly/NotHacking. He certainly believed it was not. But my point is not whether you think the crime is clear or not. It is that Aaron certainly had a belief that others in the legal community have supported that his "crime" was uncertain.

It may well be that our criminal justice system doesn't reckon that uncertainty at charging — just like it doesn't reckon motive, or the other factors that lead most people to view the government's behavior in this case as disproportionate. But if indeed that is the criminal justice system's practice, it is a mistake. The realities of the cost of criminal defense mean that only the most wealthy have the opportunity to have these critical factors reckoned properly in their case. Aaron in this respect was more fortunate than 99% of criminal defendants. He had the resources to retain excellent legal counsel. But I'm sure the fact that that retainer had exhausted *all* of his

resources weighed heavily on him last January — as it would weigh heavily on any of us.

The CFAA is a mess. (As Kerr drafted for our essay, "This federal criminal statute has gotten way out of hand.") Aaron thought he had a way around it. Whatever his motive, it wasn't to benefit himself privately. And even if he was too clever by half, we should have a criminal justice system that can get to the fairly obvious conclusion about such behavior, in light of this legal uncertainty, without bleeding a defendant dry, and taking control of his life for 2 years even before he faces even more time in a federal penitentiary.

18. *passim*, "bullying"

Your essay makes it clear that you were upset that "your colleague," as you refer to me multiple times, had referred to this prosecution as an instance of "bullying." It's also clear you consider it wrong for me, or others, to have invoked the "35 years" statistic in characterizing the extremism of the CFAA.

I understand your frustration. Though I have tried to be meticulous about not mentioning your son's name in anything I have said, I get that he's your son, and that you feel directly any criticism or harmed threatened against him. Aaron was also, in our family, like a son. That was the nature of the relationship I had with him; he was the brother to my children. So I understand perfectly well the natural desire to defend. And while our losses from this mess are not equal, I recognize there are losses on both sides.

But let's be clear about the origin of the 35 year statistic. Its source is the U.S. Attorney's press release announcing the indictment: "If convicted on these charges, SWARTZ faces up to 35 years in prison, to be followed by three years of supervised release, restitution, forfeiture and a fine of up to $1 million."

I'm not sure I see how it could be inappropriate for defenders of Swartz to complain about the extremism of "35 years in prison," but appropriate for the U.S. Attorney to brag about the toughness of her office by pointing to the same "35 years in prison."

More generally, however, my criticism is not of "bullying." It is our criminal justice system's selective bullying. Elliot Spitzer was

a bully — and more power to him. But the wrong that I believe exists here is that in a world, as Elizabeth Warren has said again and again in the Senate, where the most powerful escape prosecution for acts that are plainly harmful in a real sense of that term, it is bullying of the worst sort when the system then focuses its power on those who can't defend themselves, or its anger and vindictiveness on those who have the temerity to try.

I get that it is a common tactic among prosecutors to open low, and raise the bid at each round. In a world where the acts that Aaron are charged with means he "faces up to 35 years in prison, to be followed by three years of supervised release, restitution, forfeiture and a fine of up to $1 million," I understand how it is an effective strategy. No doubt it helps explain why this Nation, with just 5% of the world's population, has close to 25% of the world's prisoners.

But that this is done generally does not make it right. And nothing in your essay convinces me that it is right, either in this case — of at worst, a publicly motivated wrongful act which caused no real harm to anyone, by a person whose honest (and non-crazy) belief was that he had not committed a crime — or generally.

No doubt, that failure in me to be persuaded ties in part to my strong tie to this particular tragedy. I desperately await the time when the need for me to confront and address this tragedy will have passed, even though I recognize, as I suspect you would as well, the loss never will.